



# DISPARITY DATA ANALYSIS: AVAILABILITY & UTILIZATION OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES

## INTRODUCTION AND LEGAL FRAMEWORK

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Local Law 129 of 2005 (LL 129), codified at § 6-129 of the Administrative Code of the City of New York, established a program, administered by the Department of Small Business Services (SBS), to enhance participation by minority- and women-owned business enterprises (M/WBEs) in City procurement. Local Law 12 of 2006 amended §6-129 to add provisions for Emerging Business Enterprises.

Both the development of the City's current MWBE program and the preparation of this data analysis and accompanying recommendations have been guided by principles announced by the United States Supreme Court in Equal-Protection-Clause cases challenging government's use of race and gender classifications. To survive judicial scrutiny, any governmental program that employs race-based classifications must be narrowly tailored and further a compelling interest, City of Richmond v. J.A. Croson Co. (hereafter "Croson"), 488 U.S. 469 (1989). A government program that employs gender classifications must be substantially related to the achievement of an important governmental objective. Government's justification for such a program must be "exceedingly persuasive." United States v. Virginia, 518 U.S. 515, 533 (1996).

Croson provides guidance specific to the development of an affirmative action program for government procurement. With respect to identifying a "compelling interest," Croson states that when the government finds that it has become a "passive participant" in a system of racial discrimination practiced within an industry, it may take "affirmative steps" to dismantle that system. Croson at 492. The desire to remedy societal discrimination is not sufficient; a local government must have a "strong basis in evidence for its conclusion that remedial action is necessary." Id. at 499-500; 505. A "significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged" by local government gives rise to an inference of discriminatory exclusion. With respect to "narrow tailoring," Croson indicates that "rigid numerical quotas" are difficult to justify. Croson at 508. Court rulings subsequent to Croson have looked favorably on programs that establish goals and allow for waivers when goals are not achieved despite good faith efforts. Croson also made clear that the size of any goal must be determined in relation to the availability of qualified firms in the relevant market, not overall population demographics.

Based on Croson and the line of cases interpreting that precedent, M/WBE programs across the country have been crafted to address the results of "disparity studies." To draft and enact LL 129, the City relied upon a 2005 disparity study documenting the fact that the share of City contracts awarded to M/WBEs fell significantly below the share to be expected based upon their availability in the market. Recognizing that case law required ongoing tracking of data to ensure that the City's goals remained consistent with empirical evidence of disparity, LL 129 established detailed tracking and analysis requirements.

Pursuant to §6-129(d)(4), the Commissioner of SBS and the City Chief Procurement Officer (CCPO) were directed to “review and compare the availability rates of firms owned by minorities and women to the utilization rates of such firms in agency contracts and subcontracts, and ... on the basis of such review and any other relevant information, where appropriate, revise by rule the citywide participation goals.”

The purpose of this report is to set forth analysis of relevant data compiled pursuant to the requirements of LL 129. It forms the basis for a revised statutory framework that will enable the City to significantly increase the participation of M/WBE firms in City procurements as part of a continuing effort to expand business opportunity generally, and reduce barriers to participation that the data suggests M/WBE firms continue to face with respect to City contracts for a wide range of goods and services. In addition to the analysis presented here, testimony will be presented to the City Council by the SBS Commissioner and the CCPO; by City agencies that have implemented the Local Law 129 program; by certified M/WBE firms and other New York City vendors that have competed for contracts under that program; and by other advocates and stakeholders knowledgeable about the capabilities and aspirations of the City’s M/WBEs. Based on the data reflected in this report, the proposed amendments to the City’s M/WBE program would result in an estimated three-fold increase in the amount of total projected business value of the M/WBE participation goals.

This report sets forth the analysis of procurement disparity, over the course of the two year period of Fiscal Years 2009-2010, conducted by the Mayor’s Office of Contract Services (MOCS).<sup>1</sup> This report incorporates by reference the data contained in the MOCS Annual Procurement Indicators Reports for Fiscal Years 2007-2010. See [http://www.nyc.gov/html/mocs/html/research/indicator\\_reports.shtml](http://www.nyc.gov/html/mocs/html/research/indicator_reports.shtml). On the basis of this report, the Commissioner of SBS and the CCPO hereby jointly recommend that the City’s M/WBE program be updated, and that the M/WBE program created by LL 129 be amended as reflected in the draft legislation attached hereto as Appendix A.

## CONCLUSIONS

- Although the City has awarded almost \$2 billion in contract value to M/WBEs in the four years that LL 129 has been in effect, disparities still exist between the availability of M/WBE firms and the extent to which they are performing City contract work.
- The current LL 129 is based on the 2005 disparity study, which found statistically significant disparities for only certain combinations of the four ethnic and gender groups (African-Americans, Asian-Americans, Hispanic-Americans and Caucasian Women) among four industry groups (Construction, Goods, Professional Services and Standardized Services) defined in the law, and for contract amounts only up to \$1 million. The goals established in Local Law 129 reflect these findings. The data analysis in this report (hereinafter “the 2011 report”) supports establishing participation goals across a significantly broader portion of the City’s procurement portfolio than is currently covered by LL 129.

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<sup>1</sup> Under LL 129, the SBS Commissioner and the CCPO (i.e., the Director of MOCS), were directed to commence such reviews by the spring of 2007, and to re-review the matter of procurement disparity at two year intervals thereafter. Review and analysis of procurement disparity has been conducted by SBS and MOCS on an ongoing basis, beginning in the fall of 2006. Various data sets were reviewed in 2007 and 2009, resulting in determinations by the Commissioner, in consultation with the CCPO, to retain the existing LL 129 goals. At the outset of Fiscal Year 2010, upon completion of the three-year “ramp up” period under § 6-129(l)(2), SBS and MOCS broadened the scope of the review and initiated the 2011 report.

- The current law sets goals separately for prime contracts and subcontracts. The 2011 report supports redesigning the program to apply a single goal to the total amount of business generated by each procurement, thereby both increasing the available goals universe and greatly simplifying program administration.

## SUMMARY OF METHODOLOGY

To evaluate disparity, MOCS compared the availability of M/WBE firms in the market area defined in LL 129 to their utilization in the award of City prime contracts and subcontracts. For the 2011 report, availability was determined by identifying M/WBE firms certified by various government entities, as described below, and supplementing this total by a projection of the number of non-certified firms that are in fact minority- or woman-owned, as determined by a survey. Utilization was determined by examining all relevant prime and subcontracts awarded by the City during the time period analyzed, which included July 1, 2008 through June 30, 2010. In this context, “disparity” is defined as the ratio of utilization to availability. A ratio of less than .8 has generally been accepted by courts reviewing M/WBE goals programs as indicative of a statistically significant disparity.

## MARKET AREA

LL 129 defines the market area for the purposes of the City’s M/WBE program to be the 13-county area of Bronx, Kings, New York, Queens, Richmond, Nassau, Putnam, Rockland, Suffolk and Westchester counties in New York; and Bergen, Hudson and Passaic counties in New Jersey. This area was selected in 2005, based on the fact that the firms located in these counties accounted for more than 75% of the value of the City’s total purchases at that time. An examination of contracts during the two fiscal years covered by the 2011 report shows that the City’s purchases within the 13-county area continue to meet or closely approximate the 75% benchmark, except for goods purchases.

**Total Contract Value by Industry and Area**

| Industry              | Total Value             | Value in 13-County Area |            |
|-----------------------|-------------------------|-------------------------|------------|
| Construction          | \$7,884,931,517         | \$5,925,896,711         | 75%        |
| Goods                 | \$2,072,214,687         | \$922,841,712           | 45%        |
| Professional Services | \$2,226,890,041         | \$1,647,900,744         | 74%        |
| Standardized Services | \$6,137,372,759         | \$5,264,628,619         | 86%        |
| <b>Total</b>          | <b>\$18,321,409,004</b> | <b>\$13,761,267,785</b> | <b>75%</b> |

With respect to goods purchases<sup>2</sup> the 13-county market area captures a significant majority of the City’s small purchases, but less than half of the goods purchases above the \$100,000 mark.

**Total Goods Contract Value by Value Range and Area**

| Goods Value Range              | Total Value     | Value in 13-County Area |     |
|--------------------------------|-----------------|-------------------------|-----|
| Goods <=\$5,000                | \$60,808,904    | \$41,084,761            | 68% |
| Goods >\$5,000 and <=\$100,000 | \$166,712,920   | \$103,078,867           | 62% |
| Goods >\$100,000               | \$1,844,692,863 | \$778,678,084           | 42% |

Accordingly, SBS and MOCS have not recommended a participation goal for goods valued at above \$100,000 and have not incorporated any participation goals for goods in the draft legislation, other than for purchases valued at or below \$100,000.

<sup>2</sup> Procurement Policy Board Rule 1-01(e) defines goods as all personal property, including but not limited to equipment, materials, printing, and insurance, excluding land or a permanent interest in land.

## AVAILABILITY

To calculate M/WBE availability, the 2011 report sought to identify all firms, both M/WBE and non-M/WBE, that had expressed a positive interest in doing business with New York City during the two year period to be analyzed, relying upon three main data sources to build the list of available firms:

1. **Winners of City contracts and subcontracts:** MOCS keeps detailed records of all contracts and subcontracts for all Mayoral agencies governed by Chapter 13 of the New York City Charter and the Procurement Policy Board (PPB) Rules. For the purposes of the 2011 report, the list of awardees included all prime contracts procured by such agencies and registered by the Comptroller during the two year period analyzed. It also included all subcontracts on those prime contracts.
2. **Bidders:** MOCS incorporated two databases of firms actively seeking to do business with the City, including with City-affiliated entities not governed by Chapter 13 and the PPB Rules, during the two year period analyzed.
  - a. Doing Business Database: Local Law 34 of 2007 (LL 34) established a Doing Business Database (DBDB) of all firms that do or seek to do business with City agencies, City-affiliated public authorities and similar entities.<sup>3</sup> Transactions covered by LL 34 include most contracts greater than \$5,000, other than competitive sealed bids.
  - b. Agency Bid Tabulations: Because the DBDB does not contain information on competitive sealed bids, a list of all such bids awarded during the two year period analyzed was sent to each agency. Agencies then provided information on firms that bid (successfully or unsuccessfully) on these awards.
3. **Vendor Enrollment Center enrollees:** The City's Vendor Enrollment Center (VEC), a division of MOCS, maintains lists of firms that have enrolled with the City to receive invitations for relevant contract opportunities. Although not all of these firms may have bid on procurements during the two year period analyzed, they have all taken affirmative steps to enroll to do business and thus may fairly be considered "available."

Source of Available Firms

| Source                    | Count         |
|---------------------------|---------------|
| Award recipients          | 19,015        |
| Bidders                   | 13,500        |
| Enrolled firms            | 56,429        |
| <b>Total unique firms</b> | <b>70,067</b> |

Using Taxpayer Identification Numbers (TINs) to match against various City databases, firms were then categorized in a number of ways:

<sup>3</sup> In addition to City agencies, LL 34 covers "the city school district of the city of New York and any public authority, public benefit corporation or not for profit corporation, the majority of whose board members are officials of the city of new York or are appointed by such officials." NYC Admin Code §3-702(18)(a). More than 40 such governmental entities are covered, including the School Construction Authority, Health and Hospitals Corporation, NYC Housing Authority, Economic Development Corporation and Department of Education.

1. **Geography:** Firms were matched to various address sources. Any firm that had at least one business address within the 13-county area was considered to be available. Firms without any address in the area, or for which no address was obtainable, were excluded from the analysis.
2. **Industry classification:** Firms that had been awarded or bid on contracts were assigned industry classifications based on the classification of the underlying contracts. Firms that had enrolled were classified by the National Institute of Governmental Purchasing (NIGP) codes selected at enrollment. Firms that had done or sought to do business in more than one industry were counted as available in each relevant industry. For those firms for which no industry could be identified, key words matches were done on the firms' name, e.g., "Architect" or "Construction." The small percentage of firms that still could not be assigned to any category were excluded from the analysis.
3. **Ethnicity and gender:** Firms were matched to M/WBE certification lists provided by a number of government entities: SBS, Port Authority of New York and New Jersey, New York City School Construction Authority and the New York City Housing Authority.
4. **Nonprofit and government firms:** Any firm classified either in the City's Financial Management System (FMS) or on the DBDB as either a nonprofit or government entity was excluded from the analysis. Additional manual review was done to eliminate vendors obviously falling within these categories.<sup>4</sup>

As shown in the table below, after all exclusions and matching were performed, the set of "available" firms for analysis purposes consisted of 41,004 firms, of which 3,368 were known to be M/WBEs.

**Unadjusted Availability Using All Certified Firms**

| Industry              | Asian      |           | Black        |           | Hispanic   |           | Women      |           | All M/WBE    |           | Not Classified | Total         |
|-----------------------|------------|-----------|--------------|-----------|------------|-----------|------------|-----------|--------------|-----------|----------------|---------------|
|                       | #          | %         | #            | %         | #          | %         | #          | %         | #            | %         |                |               |
| Construction          | 373        | 4%        | 407          | 4%        | 279        | 3%        | 299        | 3%        | 1,358        | 15%       | 7,977          | 9,335         |
| Goods                 | 300        | 2%        | 382          | 2%        | 207        | 1%        | 361        | 2%        | 1,250        | 7%        | 17,795         | 19,045        |
| Professional Services | 448        | 3%        | 551          | 4%        | 280        | 2%        | 686        | 4%        | 1,965        | 13%       | 13,296         | 15,261        |
| Standardized Services | 439        | 2%        | 684          | 3%        | 362        | 2%        | 554        | 3%        | 2,039        | 10%       | 18,353         | 20,392        |
| <b>Total*</b>         | <b>727</b> | <b>2%</b> | <b>1,066</b> | <b>3%</b> | <b>606</b> | <b>1%</b> | <b>969</b> | <b>2%</b> | <b>3,368</b> | <b>8%</b> | <b>37,636</b>  | <b>41,004</b> |

\*Firms may be counted as available in more than one industry, so total row is smaller than sum of rows.

## OWNERSHIP SURVEY

As shown in the table above, matching against lists of government certified firms initially identified 8% of the available firms in the geographic market as M/WBE firms. However, based on the expertise of both SBS and MOCS and their experience with the relevant market, it was assumed that this percentage does not reflect the actual presence of M/WBE firms in the marketplace, as many firms that would qualify as M/WBEs are not, in fact, currently certified by the City or through any other certifying governmental entity.

<sup>4</sup> Nonprofits and governmental entities do not have owners. M/WBEs do not typically compete for the types of procurements that are awarded to nonprofits or governmental entities.

To test this assumption and identify potential additional M/WBE firms in the marketplace, MOCS conducted a telephone survey of the M/WBE ownership status of firms not classified as M/WBEs.<sup>5</sup> One thousand firms were randomly selected from the unclassified firms, 250 per industry. Attempts were made to reach all firms over a two-week period. 395 firms were successfully contacted and 298 (75%) complete surveys were conducted, resulting in the following distribution. See also Appendix B.

#### Ownership Survey Results

| Industry              | Asian     | Black     | Hispanic  | Women     | All M/WBE | Non-M/WBE  | Publicly Traded | Nonprofit | Total      |
|-----------------------|-----------|-----------|-----------|-----------|-----------|------------|-----------------|-----------|------------|
| Construction          | 4         | 4         | 1         | 15        | 24        | 59         | 2               | 1         | 86         |
| Goods                 | 5         | 4         | 3         | 17        | 29        | 39         | 2               | 3         | 73         |
| Professional Services | 3         | 6         | 4         | 9         | 22        | 36         | 4               | 0         | 62         |
| Standard Services     | 1         | 7         | 3         | 6         | 17        | 55         | 2               | 3         | 77         |
| <b>Total</b>          | <b>13</b> | <b>21</b> | <b>11</b> | <b>47</b> | <b>92</b> | <b>189</b> | <b>10</b>       | <b>7</b>  | <b>298</b> |

Based on the responses to the survey, a statistical projection was made for the actual availability of M/WBE firms in the marketplace, as follows:<sup>6</sup>

For  $i \in \{\text{"CS"}, \text{"GO"}, \text{"PS"}, \text{"SS"}\}$

and  $j \in \{\text{"Asian"}, \text{"Black"}, \text{"Hispanic"}, \text{"Women"}, \text{"Non-M/WBE"}, \text{"Nonprofit"}, \text{"Unclassified"}\}$ ;

Let  $C_{ij}$  = Initial count of firms

$R_{ij}$  = Count of firms responding to survey

$N_{ij}$  = Final calculated count of available firms

$$N_{ij} = C_{ij} + \left( \frac{R_{ij} * C_{ij=Unclassified}}{\sum R_i} \right)$$

$$Availability_{ij} = \frac{N_{ij}}{\sum N_i - N_{ij=NFP}}$$

#### Additional M/WBE Firms Based on Survey Results

| Industry              | Asian        | Black        | Hispanic     | Women        | All M/WBE     | Nonprofit  |
|-----------------------|--------------|--------------|--------------|--------------|---------------|------------|
| Construction          | 371          | 371          | 93           | 1,391        | 2,226         | 93         |
| Goods                 | 1,219        | 975          | 731          | 4,144        | 7,069         | 731        |
| Professional Services | 643          | 1,287        | 858          | 1,930        | 4,718         | 0          |
| Standardized Services | 238          | 1,668        | 715          | 1,430        | 4,052         | 715        |
| <b>Total*</b>         | <b>1,642</b> | <b>2,652</b> | <b>1,389</b> | <b>5,936</b> | <b>11,619</b> | <b>884</b> |

\*Firms may be counted as available in more than one industry, so total row is smaller than sum of rows.

<sup>5</sup> MOCS also tested the issue of whether a firm's appearance on a list of certified M/WBE firms was, in fact, a reliable indicator of such status. When an M/WBE is certified, substantial background research is done to establish its credentials. Firms are generally certified for a limited time period, reducing the risk that a change in circumstances at the firm invalidates the M/WBE status. To check the assumption that the certified M/WBE lists contained only qualified M/WBEs, MOCS also conducted a small survey of 24 randomly selected certified M/WBEs. 100% of all firms contacted provided information to confirm their M/WBE status, thus substantiating the conclusion that their M/WBE status was current, valid and accurate. Therefore, MOCS concluded that no additional statistical sampling of certified M/WBE firms was required.

<sup>6</sup> As noted above, nonprofit organizations were removed from the pool of available firms. Publicly traded companies were treated as available non-minority firms. The final count of unclassified firms is defined as zero.

Adding these adjusted values to the unadjusted availability results in the adjusted total availability:

#### Adjusted Total Availability

| Industry              | Asian        |             | Black        |             | Hispanic     |             | Women        |              | All M/WBE     |              | Non-M/WBE     | Total         |
|-----------------------|--------------|-------------|--------------|-------------|--------------|-------------|--------------|--------------|---------------|--------------|---------------|---------------|
|                       | Count        | %           | Count        | %           | Count        | %           | Count        | %            | Count         | %            |               |               |
| Construction          | 744          | 8.1%        | 778          | 8.4%        | 372          | 4.0%        | 1,690        | 18.3%        | 3,584         | 38.8%        | 5,658         | 9,242         |
| Goods                 | 1,519        | 8.3%        | 1,357        | 7.4%        | 938          | 5.1%        | 4,505        | 24.6%        | 8,319         | 45.4%        | 9,994         | 18,314        |
| Professional Services | 1,091        | 7.2%        | 1,838        | 12.0%       | 1,138        | 7.5%        | 2,616        | 17.1%        | 6,683         | 43.8%        | 8,578         | 15,261        |
| Standard Service      | 677          | 3.4%        | 2,352        | 12.0%       | 1,077        | 5.5%        | 1,984        | 10.1%        | 6,091         | 31.0%        | 13,586        | 19,677        |
| <b>Total*</b>         | <b>2,369</b> | <b>5.9%</b> | <b>3,718</b> | <b>9.3%</b> | <b>1,995</b> | <b>5.0%</b> | <b>6,905</b> | <b>17.2%</b> | <b>14,987</b> | <b>37.4%</b> | <b>25,133</b> | <b>40,120</b> |

\*Firms may be counted as available in more than one industry, so total row is smaller than sum of rows.

## UTILIZATION

The determination of disparity requires comparing the availability of M/WBE firms in the marketplace to the utilization of those firms in the award of contracts. The determination of the proportion of City business awarded to M/WBE firms is straightforward. A file was prepared of all prime contracts and subcontracts recorded in FMS for the two year period. Excluded from this file were contracts awarded to nonprofits, government entities and firms located outside the 13 country area. Also excluded were human service contracts,<sup>7</sup> contract modifications such as change orders amendments, as well as non-procurement transactions. Contract continuations, such as renewals, were traced back to determine the industry of the original award, and each contract was assigned an industry.

Prime contracts were assigned a "pure prime" value by subtracting the value of any subcontracts, with the remainder representing the value of the contract that was retained by the prime contractor. Each contract was compared to the list of M/WBE firms, as described in the Availability section above, and coded by ethnicity and gender. The resulting utilization, based on pure prime value for prime contracts and awarded value for subcontracts, is summarized below. See also Appendix C.

#### Contract Value: Pure Prime plus Subcontracts

| Industry              | Asian         | Black        | Hispanic      | Women         | All M/WBE            | Total Contracts         |
|-----------------------|---------------|--------------|---------------|---------------|----------------------|-------------------------|
| Construction          | \$161,898,237 | \$80,144,298 | \$105,845,526 | \$128,704,464 | \$476,592,525        | \$5,641,721,505         |
| Goods                 | \$8,117,848   | \$4,872,632  | \$7,235,966   | \$18,289,526  | \$38,515,972         | \$144,163,627           |
| Professional Services | \$102,223,978 | \$11,441,047 | \$9,658,768   | \$48,208,483  | \$171,532,276        | \$1,621,384,567         |
| Standardized Services | \$47,121,610  | \$36,881,298 | \$9,048,098   | \$15,926,539  | \$108,977,545        | \$5,245,978,957         |
| <b>Total</b>          |               |              |               |               | <b>\$795,618,318</b> | <b>\$12,653,248,656</b> |

#### Percent of Total Contract Value

| Industry              | Asian | Black | Hispanic | Women | All M/WBE |
|-----------------------|-------|-------|----------|-------|-----------|
| Construction          | 3%    | 1%    | 2%       | 2%    | 8%        |
| Goods                 | 6%    | 3%    | 5%       | 13%   | 27%       |
| Professional Services | 6%    | 1%    | 1%       | 3%    | 11%       |
| Standardized Services | 1%    | 1%    | 0.2%     | 0.3%  | 2%        |
| <b>Total</b>          |       |       |          |       | <b>6%</b> |

<sup>7</sup> Over 95% of human services contracts are awarded to nonprofits. Since relatively few awards are made to privately-owned firms, it is not possible to draw any statistically valid conclusions regarding M/WBE utilization.

These tables show that of the \$12.7 billion in contracts falling within the scope of LL 129 awarded during the two year period, \$796 million, or more than 6%, was awarded to firms known to be M/WBEs.

The disparity ratio for each category was determined as follows, and shows the relationship between the utilization of M/WBE firms and their availability in the marketplace. The lower the number, the greater the disparity. For each industry *i* and ethnicity or gender category *j*:

$$Disparity_{ij} = \frac{Utilization_{ij}}{Availability_{ij}}$$

**Disparity by Industry and M/WBE Classification**

| Industry              | Asian | Black | Hispanic | Women | All M/WBE | Non-M/WBE |
|-----------------------|-------|-------|----------|-------|-----------|-----------|
| Construction          | .36   | .17   | .47      | .12   | .22       | 1.50      |
| Goods                 | .60   | .07   | .16      | .19   | .24       | 1.63      |
| Professional Services | .88   | .06   | .08      | .17   | .24       | 1.59      |
| Standardized Services | .26   | .06   | .03      | .03   | .07       | 1.42      |

In this calculation, values greater than 1.0 represent overutilization, while values less than 1.0 represent underutilization of that ethnicity or gender category. For purposes of the 2011 report, significant underutilization was defined to occur when the ratio between utilization and available firms falls below .80. As shown above, all ethnicity and gender groups were underutilized and non-M/WBE firms were overutilized in every industry during the two year period analyzed. Disparity at a statistically significant level was identified for all categories except Asian firms in Professional Services. Accordingly, SBS and MOCS will not recommend a participation goal in this category, and have not incorporated any such a participation goal in the draft legislation.

Because this calculation of disparity rests on an adjustment to availability based on survey data, the 2011 report also considered whether the statistical margin of error of the survey results would impact the analysis. For comparison, availability rates and disparity ratios were recalculated using the low end of the 95% confidence interval. All of the service industries (Construction, Professional and Standardized) continue to show significant underutilization even under this highly conservative analysis.

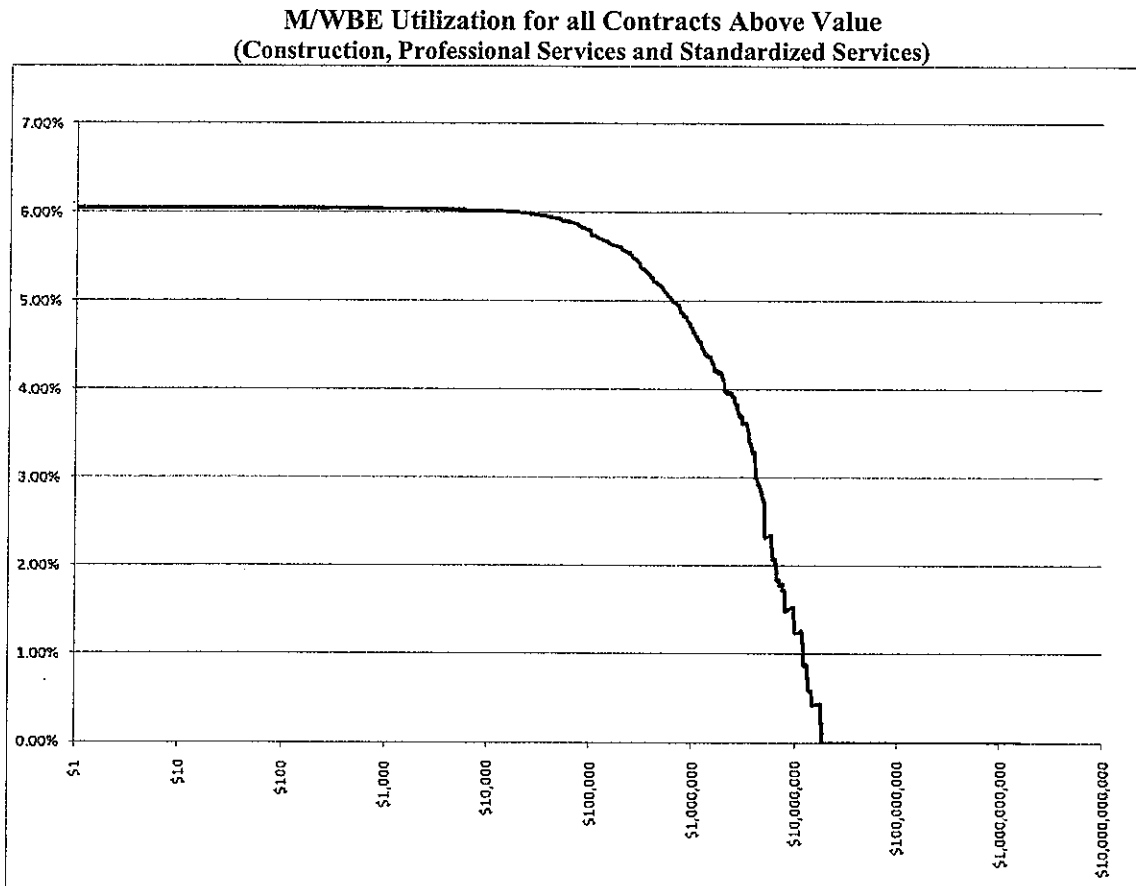
As with services, for goods all categories show significant underutilization at the midpoint of statistical estimates of availability (shown in table above). At the low end of the 95% confidence interval, all categories continue to show underutilization but (unlike for services) not all categories of goods show significant underutilization, as defined for purposes of this analysis. However, the goods analysis only covers small and micro purchases, procurement methods in which agencies have considerable discretion to achieve their M/WBE goals. As a result, a finding of disparity at a lower confidence level is not at all surprising, and neither the 2011 report nor the track record of the existing program supports the elimination of goals in this category.

## CAPACITY

Utilization data for the two year period analyzed show that statistically significant numbers of M/WBE firms were successful at winning contracts and subcontracts below \$1 million, the threshold used in LL 129, although statistically significant disparities between availability and utilization persist. More importantly, however, the evidence shows that statistically significant numbers of firms also continue to be successful, albeit at a lower rate, at much higher contract values, with fairly robust success rates up to



\$5 million.. Overall, the rate of M/WBE utilization fell off significantly between \$1 million and \$10 million, falling to half the overall utilization rate at contract values just over \$4 million and above.



A more rigorous analysis of the data supports this understanding, to the effect that the small number of contracts procured at the highest dollar values suggests that the relative success of M/WBEs or lack thereof could be due to chance. The descriptive statistics of the utilization data suggest that the mean is inflated by a few extremely large values, or outliers.<sup>8</sup> By converting real values into standardized Z scores, these univariate outliers can be detected.<sup>9</sup> In an approximate normal distribution, about 99% of the scores should lie within three standard deviations of the mean. Thus, any z value > 3 indicates a value

<sup>8</sup> As shown below, the distribution of contracts is highly and positively skewed. If a distribution of the data is symmetrical the value of the skewness will equal zero. The skewness for all industries is 24.5, much larger than the standard error of .02 (typically, a skewness larger than two standard errors indicates a significantly skewed distribution). All positive values for Kurtosis also confirm that the data are concentrated in the peak.

**Descriptive Statistics of Contract Values**

| Industry              | N            | Minimum  | Maximum           | Mean              | Standard Deviation | Skewness / Std. Error | Kurtosis / Std. Error |
|-----------------------|--------------|----------|-------------------|-------------------|--------------------|-----------------------|-----------------------|
| Construction          | 1,281        | 0        | 179,44,917        | 371,871.60        | 1,333,653.58       | 7.34 / .07            | 65.83 / .14           |
| Professional Services | 403          | 1        | 10,000,000        | 425,638.40        | 1,130,151.87       | 4.42 / .12            | 23.41 / .24           |
| Standard Services     | 4,559        | 0        | 18,500,000        | 23,903.67         | 363,887.33         | 35.56 / .04           | 1,597.19 / .07        |
| <b>Total</b>          | <b>6,243</b> | <b>0</b> | <b>18,500,000</b> | <b>121,236.05</b> | <b>754,633.88</b>  | <b>12.92 / .03</b>    | <b>217.44 / .06</b>   |

<sup>9</sup> 
$$Z_i = \frac{x_i - \bar{x}}{s_i}$$

very unlikely to occur and the  $z$  value can be extended to 4 if the population is greater than 100. At a contract value of just under \$5 million,  $z = 6$ .<sup>10</sup> Above this value there are not enough contracts to draw firm conclusions about the utilization of M/WBEs. For a contract value just over \$4 million,  $z = 5$ .

The above analysis does not support a conclusion that the M/WBEs available in the City's marketplace entirely lack the capacity to handle large contracts. Within the two year period analyzed the largest contract won by an M/WBE was almost \$32 million and the largest subcontract was \$14.5 million. The evidence indicates that there are available M/WBEs that have demonstrated some capacity to handle large volumes of work in each of the basic industries that the City procures. While the City does procure some very large contracts, e.g., those valued at over \$25 million, such large-scale purchases amount to only a small fraction (under 2%) of the approximately 5,000 contract actions that City agencies undertake for goods, services and construction valued above the small purchase limits. Awards in the \$3 million range represent more typical-sized contracts awarded by the City. Indeed, about 20% of the City's contracts fall in the range between one and three million dollars, and another 14% between three million dollars and \$25 million. (All of the rest of the City's contract awards are valued below one million dollars.) Because the data analysis shows M/WBE steadily increasing their success at winning awards well above the three million dollar threshold, that evidence suggests that for the vast majority of the City's procurements, M/WBE capacity exists in the marketplace. It is therefore appropriate for the goals program to address the capacity issue for those few very large-scale procurements where capacity is more questionable, on a case-by-case basis, tailoring the goals for those contracts to their specific facts.

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<sup>10</sup>

$z = 6$  at \$4,720,460.

## APPENDIX A: DRAFT LEGISLATION

Int. No. 911

By The Speaker (Council Member Quinn), and Council Members Sanders, Comrie, Dickens, Reyna, Jackson, Mark-Viverito, Mealy, Williams, Arroyo, Brewer, Chin, Crowley, Dromm, Eugene, Foster, Gentile, Gonzalez, James, Koo, Koppell, Koslowitz, Lander, Mendez, Palma, Recchia, Vann and Halloran

A Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to opportunities for minority and women owned business enterprises and emerging business enterprises in city procurement.

Be it enacted by the Council as follows:

Section 1. Subdivision e of section 1304 of the New York city charter, as amended by local law number 12 for the year 2006, is amended to read as follows:

e. The commissioner shall have the following powers and duties to implement the purposes of this section:

1. to direct and assist agencies in their efforts to increase participation by minority and women owned business enterprises and emerging business enterprises as contractors and subcontractors in city procurement;
2. to develop standardized forms and reporting documents;
3. to conduct, coordinate and facilitate technical assistance and educational programs;
4. to periodically review the compliance of city agencies with the provisions of local law for the identification, recruitment, certification and participation in city procurement of minority and women owned business enterprises and emerging business enterprises;
5. to annually report to the mayor and the council, as required by such local law, on the activities of the division and efforts by agencies to comply with the provisions of such local law;

6. a. to establish and operate, on behalf of the city, a centralized program for the certification of minority owned business enterprises, women owned business enterprises and emerging business enterprises for the purposes of establishing the eligibility of such businesses for participation in the programs and processes established pursuant to local law to ensure their meaningful participation in city procurement.

b. For the purposes of such certification, "minority owned business enterprise" and "women owned business enterprise" shall mean business enterprises authorized to do business in this state, including sole proprietorships, partnerships and corporations, in which (i) at least fifty-one percent of the ownership interest is held by United States citizens or permanent resident aliens who are either minority group members or women, (ii) the ownership interest of such [persons] individuals is real, substantial and continuing, and (iii) such [persons] individuals have and exercise the authority to control independently the day to day business decisions of the enterprise;

c. For the purposes of such certification, "emerging business enterprise" shall mean a business enterprise authorized to do business in this state, including sole proprietorships, partnerships and corporations, in which (i) at least fifty-one percent of the ownership interest is held by United States citizens or permanent resident aliens; (ii) the ownership interest of such [persons] individuals is real, substantial and continuing, (iii) such [persons] individuals have and exercise the authority to control independently the day to day business decisions of the enterprise; and (iv) such [persons] individuals have demonstrated, in accordance with regulations promulgated by the commissioner, that they are socially and economically disadvantaged. [A person] An individual who is "socially and economically disadvantaged" shall mean [a person] an individual who has experienced social disadvantage in American society as a result of causes not common to [persons] individuals who are not socially disadvantaged, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. [A

person's] An individual's race, national origin, or gender by itself, shall not qualify the [person] individual as "socially disadvantaged." In drafting such regulations, the commissioner shall consider criteria developed for federal programs established to promote opportunities for businesses owned by [persons] individuals who are socially and economically disadvantaged, including criteria for determining initial and continued eligibility in relation to the net worth of [persons] individuals claiming to be economically disadvantaged, provided that the net worth of [a person] an individual claiming disadvantage pursuant to this section must be less than one million dollars. In determining such net worth, the department shall exclude the ownership interest in the business enterprise and the equity in the primary personal residence.

d. To be eligible for certification, a business enterprise shall have a real and substantial business presence in the market for the city of New York, as defined by the commissioner pursuant to local law.

e. The commissioner of small business services may provide by rule criteria and procedures for firms certified as minority owned businesses and women owned businesses by other governmental entities to be recognized as certified business enterprises by the city of New York.

7. to conduct site visits at business enterprises prior to certification, the basis for which shall be provided by rule, to verify that such business enterprises are eligible to participate in programs established pursuant to local law;

[7]8. to audit such business enterprises and periodically review and in appropriate cases recertify their eligibility for participation in programs established pursuant to local law;

[8]9. to direct and assist city agencies in their efforts to increase participation by minority owned business enterprises, women owned business enterprises and emerging business enterprises in any city-operated financial, technical, and management assistance program;

[9]10. to assist all business enterprises certified pursuant to this section in becoming prequalified

for all categories of procurement for which they may be eligible and for which contracting agencies utilize prequalification in the procurement process;

[10]11. to prepare, [and] periodically update, and post online the website of the division a directory of such city certified business enterprises for use by city agencies and contractors, which shall include information for each such business enterprise, as applicable, including but not limited to: (i) identification of the market sector in which the business enterprise operates; (ii) the bonding capacity of the business enterprise; (iii) the contract price and specific tasks performed by the business enterprise for its last three contracts; (iv) the union affiliation, if any, of the city certified business enterprise; and (v) the renewal date for certification; [and]

12. to develop a clearinghouse of information on programs and services available to such business enterprises; and

[11]13. to provide such assistance to business enterprises interested in being certified as is needed to ensure that such businesses benefit from city technical, managerial, and financial assistance, and other business development programs.

§2. Section 6-129 of the administrative code of the city of New York, as amended by local law number 6 for the year 2006, is amended to read as follows:

§ 6-129. Participation by minority-owned and women-owned business enterprises and emerging business enterprises in city procurement.

a. Programs established. There are hereby established a program, to be administered by the department of small business services in accordance with the provisions of this section, designed to enhance participation by minority-owned and women-owned business enterprises in city procurement and a program, also to be administered by such department in accordance with the provisions of this section,

designed to enhance participation by emerging business enterprises in city procurement.

b. Policy. It is the policy of the city to seek to ensure fair participation in city procurement; and in furtherance of such policy to fully and vigorously enforce all laws prohibiting discrimination, and to promote equal opportunity in city procurement by vigorously enforcing the city's contractual rights and pursuing its contractual remedies. The program established pursuant to this section is intended to address the impact of discrimination on the city's procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for city business, and lowering contract costs.

c. Definitions. For purposes of this section, the following terms shall have the following meaning:

(1) "Agency" means a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury.

(2) "Agency chief contracting officer" means the [person] individual to whom an agency head has delegated authority to organize and supervise the agency's procurement activity.

(3) "Availability rate" means the percentage of business enterprises within an industry classification that are owned by minorities, women or [persons] individuals who are socially and economically disadvantaged willing and able to perform agency contracts.

(4) "Bidder" means any person submitting a bid or proposal in response to a solicitation for such bid or proposal from an agency.

(5) "Bidders list" or "proposers list" means a list maintained by an agency that includes persons from whom bids or proposals can be solicited.

(6) "City" means the city of New York.

(7) "City chief procurement officer" means the [person] individual to whom the mayor has delegated authority to coordinate and oversee the procurement activity of mayoral agency staff, including the agency chief contracting officers and any offices that have oversight responsibility for procurement.

(8) "Commercially useful function" means a real and actual service that is a distinct and verifiable element of the work called for in a contract. In determining whether an MBE, WBE or EBE is performing a commercially useful function, factors including but not limited to the following shall be considered:

[(i)](a) whether it has the skill and expertise to perform the work for which it is being utilized, and possesses all necessary licenses;

[(ii)](b) whether it is in the business of performing, managing or supervising the work for which it has been certified and is being utilized; and

[(iii)](c) whether it purchases goods and/or services from another business and whether its participation in the contract would have the principal effect of allowing it to act as a middle person or broker in which case it may not be considered to be performing a commercially useful function for purposes of this section.

(9) "Commissioner" shall mean the commissioner of small business services.

(10) "Construction [ contract]" means [any agreement with an agency for or in connection with the] construction, reconstruction, demolition, excavation, renovation, alteration, improvement, rehabilitation, or repair of any building, facility, physical structure of any kind.

(11) "Contract" means any agreement, purchase order or other instrument whereby the city is committed to expend or does expend funds in return for goods, professional services, standard services,



[architectural and engineering services,] or construction.

(12) "Contractor" means a person who has been awarded a contract by a city agency.

(13) "Direct subcontractor" means a person who has entered into an agreement with a contractor to provide services or perform work that is required pursuant to a contract with a city agency.

(14) "Director" means an individual designated by the mayor who reports directly to the mayor.

[(13)](15) "Directory" means a list prepared by the division of firms certified pursuant to section 1304 of the charter.

[(14)](16) "Division" shall mean the division of economic and financial opportunity within the department of small business services.

(17) "EBE" means an emerging business enterprise certified in accordance with section 1304 of the charter.

[(17)](18) "Geographic market of the city" means the following counties: Bronx, Kings, New York, Queens, Richmond, Nassau, Putnam, Rockland, Suffolk and Westchester within the State of New York; and Bergen, Hudson, and Passaic within the state of New Jersey.

[(16)](19) "Goal" means a numerical target.

[(17)](20) "Graduate MBE," "graduate WBE" or "graduate EBE" means an MBE, WBE or EBE [which shall have been awarded prime contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than fifteen million dollars] whose size has exceeded the size standards established for its industry by the United States small business administration for three years.

(21) "Human services" means services provided to third parties, including social services such as day care, foster care, home care, homeless assistance, housing and shelter assistance, preventive services, youth services, and senior centers; health or medical services including those provided by health maintenance organizations; legal services; employment assistance services, vocational and educational programs; and recreation programs.

(22) "Indirect subcontractor" means a person who has entered into an agreement with a direct subcontractor to provide services or perform work that is required pursuant to the direct subcontractor's contract with a contractor.

[(18)](23) "Industry classification" means one of the following classifications:

[(i)](a) construction [services];

[(ii)](b) professional services;

[(iii)](c) standard services; and

[(iv)](d) goods.

[(19)](24) "Joint venture" means an association, of limited scope and duration, between two or more persons who have entered into an agreement to perform and/or provide services required by a contract, in which each such person contributes property, capital, effort, skill and/or knowledge, and in which each such person is entitled to share in the profits and losses of the venture in reasonable proportion to the economic value of its contribution.

[(20)](25) "MBE" means a minority-owned business enterprise certified in accordance with section 1304 of the charter.

[(21)](26) "Minority group" means Black Americans; Asian Americans, and Hispanic

Americans, provided that the commissioner shall be authorized to add additional groups to this definition upon a finding that there is statistically significant disparity between the availability of firms owned by [persons] individuals in such a group and the utilization of such firms in city procurement.

(27) "Non-certified firm" means a business enterprise that has not been certified as an MBE, WBE or EBE in accordance with section 1304 of the charter.

[(22)](28) "Person" means any business, individual, partnership, corporation, firm, company, or other form of doing business.

[(23)](29) "Professional services" means services that require specialized skills and the exercise of judgment, including but not limited to accountants, lawyers, doctors, computer programmers and consultants, architectural and engineering services, and construction management services.

[(24)](30) "Qualified joint venture agreement" means a joint venture between one or more MBEs, WBEs, and/or EBEs and another person, in which the percentage of profit or loss to which the certified firm or firms is entitled or exposed to for participation in the contract, as set forth in the joint venture agreement, is at least 25% of the total profit or loss.

[(25)](31) "Scope of work" means specific tasks required in a contract and/or services or goods that must be provided to perform specific tasks required in a contract.

[(26)](32) "Standard services" means services other than professional services and human services.

[(27)] "Subcontractor" means a person who has entered into an agreement with a contractor to provide something that is required pursuant to a contract.]

[(28)](33) "Utilization rate" means the percentage of total contract expenditures expended on contracts or subcontracts with firms that are owned by women, minorities, or [persons] individuals who

are socially and economically disadvantaged, respectively, in one or more industry classifications.

[(29)](34) "WBE" means a women-owned business enterprise certified in accordance with section 1304 of the charter.

[(30) "EBE" means an emerging business enterprise certified in accordance with section 1304 of the charter.]

d. Citywide goals. (1) The citywide contracting participation goals for MBEs, WBEs and EBEs, which may be met through awards of prime contracts or subcontracts as described in subdivision j of this section, shall be as follows:

For construction contracts [under one million dollars]:

| Category:                | Participation goal:   |
|--------------------------|---|
| Black Americans          | [12.63%]8% of total annual agency expenditures on such contracts        |
| <u>Asian Americans</u>   | <u>8% of total annual agency expenditures on such contracts</u>         |
| Hispanic Americans       | [9.06%] <u>4%</u> of total annual agency expenditures on such contracts |
| <u>Caucasian females</u> | <u>18% of total annual agency expenditures on such contracts</u>        |
| Emerging                 | 6% of total annual agency expenditures on such contracts                |

For professional services contracts [under one million dollars]:

| [Race/gender group] <u>Category:</u> Participation goal: |   |
|--|---|
| Black Americans  | [9%] <u>12%</u> of total annual agency expenditures on such contracts |
| Hispanic Americans                                       | [5%] <u>8%</u> of total annual agency expenditures on                 |

|                   |  |
|-------------------|--|
|                   | such contracts   |
| Caucasian females | [16.5%] <u>37%</u> of total annual agency expenditures on such contracts |
| Emerging          | 6% of total annual agency expenditures on such contracts                 |

For standard services contracts [under one million dollars]:

|   |   |
|---|---|
| [Race/gender group] <u>Category</u> : Participation goal: |   |
| Black Americans   | [9.23%] <u>12%</u> of total annual agency expenditures on such contracts  |
| <u>Asian Americans</u>                                    | <u>3% of total annual agency expenditures on such contracts</u>           |
| Hispanic Americans  | [5.14%] <u>6%</u> of total annual agency expenditures on such contracts   |
| Caucasian females   | [10.45%] <u>10%</u> of total annual agency expenditures on such contracts |
| Emerging  | 6% of total annual agency expenditures on such contracts                  |

For goods contracts under one [million] hundred thousand dollars:

|   |   |
|---|---|
| [Race/gender group] <u>Category</u> : Participation goal: |   |
| Black Americans   | [7.47%] <u>7%</u> of total annual agency expenditures on such contracts |
| Asian Americans   | [5.19%] <u>8%</u> of total annual agency expenditures on such contracts |
| Hispanic Americans  | [4.99%] <u>5%</u> of total annual agency expenditures on such contracts |

|                   |   |
|-------------------|---|
| Caucasian females | [17.87%] <u>25%</u> of total annual agency expenditures on such contracts |
| Emerging          | 6% of total annual agency expenditures on such contracts                  |

[For construction subcontracts under one million dollars:

|  |   |
|--|---|
| Race/gender group: Participation goal: |   |
| Black Americans                        | 12.63% of total annual agency expenditures on such subcontracts |
| Asian Americans                        | 9.47% of total annual agency expenditures on such subcontracts  |
| Hispanic Americans                     | 9.06% of total annual agency expenditures on such subcontracts  |
| Emerging                               | 6% of total annual agency expenditures on such subcontracts     |

For professional services subcontracts under one million dollars:

|                    |  |
|--------------------|--|
| Race/gender group: | Participation goal:  |
| Black Americans    | 9% of total annual agency expenditures on such subcontracts    |
| Hispanic Americans | 5% of total annual agency expenditures on such subcontracts    |
| Caucasian females  | 16.5% of total annual agency expenditures on such subcontracts |
| Emerging           | 6% of total annual agency expenditures on such subcontracts    |

]

- (2) (a) The division and the city chief procurement officer shall develop a citywide utilization

plan for procurements of goods.

(b) Agencies shall develop agency utilization plans pursuant to subdivision g of this section. The citywide goals shall not be summarily adopted as goals for all annual agency utilization plans; rather, goals for such plans may be set at levels higher, lower, or the same as the citywide goals, subject to the approval of the commissioner as described in paragraph three of subdivision g of this section. When setting its goals, each agency shall consider the citywide goals, the size and nature of its own procurement portfolio, and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work for which the agency anticipates it will solicit procurements during the year. Agencies shall seek to ensure substantial progress toward the attainment of each of these goals in as short a time as practicable.

(3) The citywide goals shall not be summarily adopted as goals for individual procurements; rather, as set forth in subdivision i of this section, goals for such procurements may be set at levels higher, lower, or the same as the citywide goals. In setting such goals, each agency shall take into account the citywide goals and the agency's annual utilization plan, the size and nature of the procurement, and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work involved in its procurements.

(4) [(A)](a) No later than 2015, [Beginning twelve months after the effective date of the local law that added this section and every two years thereafter,] the commissioner, in consultation with the city chief procurement officer, shall, for each industry classification and each minority group, review and compare the availability rates of firms owned by minorities and women to the utilization rates of such firms in agency contracts and direct subcontracts, and shall on the basis of such review and any other relevant information, where appropriate, revise by rule the citywide participation goals set forth in this subdivision. In making such revision, the commissioner shall consider the extent to which discrimination

continues to have an impact on the ability of minorities and women to compete for city contracts and subcontracts. The commissioner shall submit the results of such review and any proposed revisions to the participation goals to the speaker of the council at least sixty days prior to publishing a proposed rule that would revise participation goals. Such review shall thereafter be conducted at least once every two years.

[(B)](b) No later than 2015. [Beginning twelve months after the effective date of the local law that added this section and every two years thereafter,] the commissioner shall review information collected by the department to determine the availability and utilization of EBEs, and shall on the basis of such review and any other relevant information, where appropriate, revise by rule the citywide participation goals set forth in this subdivision. Such revised goals shall be set at a level intended to assist in overcoming the impact of discrimination on such businesses. Such review shall be conducted in 2015 and at least once every two years thereafter.

e. Responsibilities of the division.

(1) The division shall create and maintain and periodically update directories by industry classification of MBEs, WBEs, and EBEs which it shall supply to all agencies, post on its website and on other relevant city websites and make available for dissemination and/or public inspection at its offices and other locations within each borough.

(2) The division shall make its resources available to assist agencies and contractors in (i) determining the availability of MBEs, WBEs, and EBEs to participate in their contracts as prime contractors and/or subcontractors; and (ii) identifying opportunities appropriate for participation by MBEs, WBEs, and EBEs in contracts.

(3) The division shall develop and maintain relationships with organizations representing contractors, including MBEs, WBEs, and EBEs, and solicit their support and assistance in efforts to increase participation of MBEs, WBEs, and EBEs in city procurement.



(4) The division shall coordinate with city and state entities that maintain databases of MBEs, WBEs, and EBEs and work to enhance city availability data and directories.

(5) The division shall keep agency M/WBE [and EBE] officers informed of conferences, contractor fairs, and other services that are available to assist them in pursuing the objectives of this section.

(6) The division shall conduct, coordinate and facilitate technical assistance and educational programs for MBEs, WBEs, and EBEs and other contractors designed to enhance participation of MBEs, WBEs, and EBEs in city procurement. The division shall further develop a clearinghouse of information on programs and services available to MBEs, WBEs, and EBEs. The division shall conduct meetings with MBEs, WBEs and EBEs to discuss what agencies look for in evaluating bids and proposals. The division shall also educate prime contractors on opportunities to partner or subcontract with certified MBEs, WBEs and EBEs.

(7) The division shall develop standardized forms and reporting documents for agencies and contractors to facilitate the reporting requirements of this section.

(8) The division shall direct and assist agencies in their efforts to increase participation by MBEs, WBEs, and EBEs in any city-operated financial, technical, and management assistance program.

(9) The division shall study and recommend to the commissioner methods to streamline the M/WBE and EBE certification process.

(10) Each fiscal year the division, in consultation with the city chief procurement officer, shall audit at least 5% of all open contracts for which contractor utilization plans [are] have been established in accordance with subdivision i of this section and 5% of all contracts awarded to MBEs, WBEs, and EBEs to assess compliance with this section. All solicitations for contracts for which contractor utilization plans are to be established shall include notice of potential audit.

(11) The division shall assist agencies in identifying and seeking ways to reduce or eliminate practices such as bonding requirements or delays in payment by prime contractors that may present barriers to competition by MBEs, WBEs, and EBEs.

(12) The division shall encourage prime contractors to enter joint venture agreements with MBEs, WBEs and EBEs.

(13) (a) The division shall, upon reviewing applications for certification and recertification, determine whether a firm qualifies as a graduate MBE, WBE or EBE.

(b) The division shall promulgate regulations establishing a process by which a certified MBE, WBE or EBE may challenge a determination that it qualifies as a graduate MBE, WBE or EBE.

(c) At any time more than two years after the division has determined that a firm qualifies as a graduate MBE, WBE or EBE, the firm may apply to have such designation lifted. The division shall lift the designation if the firm demonstrates that it has been below the size standards established by the United States small business administration for its industry for a period of two years or more.

f. Responsibilities of agency M/WBE officers. Each agency head shall designate a deputy commissioner or other executive officer to act as the agency M/WBE officer who shall be directly accountable to the agency head concerning the activities of the agency in carrying out its responsibilities pursuant to this section, including the responsibilities relating to EBE participation. The duties of the M/WBE officer shall include, but not be limited to:

[(i)](1) creating the agency's utilization plan in accordance with subdivision g of this section;

[(ii)](2) acting as the agency's liaison with the division;

[(iii)](3) acting as a liaison with organizations and/or associations of MBEs, WBEs, and EBEs,

informing such organizations and/or associations of the agency's procurement procedures, and advising them of future procurement opportunities;

[(iv)](4) ensuring that agency bid solicitations and requests for proposals are sent to MBEs, WBEs, and EBEs in a timely manner, consistent with this section and rules of the procurement policy board;

[(v)](5) referring MBEs, WBEs, and EBEs to technical assistance services available from agencies and other organizations;

[(vi)](6) reviewing requests for waivers [of target subcontracting percentages] and/or modifications of participation goals and contractor utilization plans in accordance with paragraphs 11 and/or 12 of subdivision i of this section;

[(vii)](7) working with the division and city chief procurement officer in creating directories as required pursuant to subdivision k of this section. In fulfilling this duty, the agency M/WBE officer shall track and record each contractor that is an MBE, WBE or EBE and each subcontractor hired pursuant to such officer's agency contracts that is an MBE, WBE or EBE, and shall share such information with the commissioner, [and] the city chief procurement officer, and the director;

[(viii)](8) for contracts for which contractor utilization [goals] plans have been established pursuant to subdivision i of this section, monitoring each contractor's compliance with its utilization plan by appropriate means, which shall include, but need not be limited to, job site inspections, contacting MBEs, WBEs and EBEs identified in the plan to confirm their participation, and auditing the contractor's books and records;

[(ix)](9) monitoring the agency's procurement activities to ensure compliance with its agency utilization plan and progress towards the participation goals as established in such plan; [and]

[(x)](10) providing to the city chief procurement officer information for the reports required in

subdivision l of this section and providing any other plans and/or reports required pursuant to this section or requested by the city chief procurement officer and/or the director[.]; and

(11) participating in meetings required pursuant to subdivision m of this section.

g. Agency utilization plans.

(1) Beginning May 15, 2006, and on April 1 of each year thereafter, each agency which, during the fiscal year which ended on June 30 of the preceding year, has made procurements in excess of five million dollars[ during the fiscal year which ended on June 30 of the preceding calendar year], without counting procurements that are exempt pursuant to paragraph two of subdivision q of this section, shall submit an agency utilization plan for the fiscal year commencing in July of the year when such plan is to be submitted to the commissioner. Upon approval by the commissioner such plan shall be submitted to the speaker of the council. Each such plan shall, at a minimum, include the following:

[(i)](a) the agency's participation goals for MBEs, WBEs and EBEs for the year, provided however, that when setting its goals, each agency shall consider the citywide goals, the size and nature of its own procurement portfolio (excluding contracts described in paragraph two of subdivision q of this section), and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work for which the agency anticipates it will solicit procurements during the year;

[(ii)](b) an explanation for any agency goal that is different than the participation goal for the relevant group and industry classification as determined pursuant to subdivision d of this section;

[(iii)](c) a list of the names and titles of agency personnel responsible for implementation of the agency utilization plan;

[(iv)](d) methods and relevant activities proposed for achieving the agency's participation goals;  
and

[(v)](e) any other information which the agency or the commissioner deems relevant or necessary.

(2) An agency utilization plan shall set forth specific participation goals for MBEs, WBEs and/or EBEs for purchases of professional services, standard services, construction and goods valued at or below twenty thousand dollars, and for purchases of professional services, standard services, construction and goods valued at or below one hundred thousand dollars. When setting its goals for such purchases, in addition to the factors set forth in paragraph (1) of this subdivision, each agency shall specifically consider the potential for such purchases to provide opportunities for MBEs, WBEs and EBEs to develop greater capacity, thereby increasing competition for city procurements.

[(2)](3) An agency utilization plan may be amended from time to time to reflect changes in the agency's projected expenditures or other relevant circumstances and resulting changes in such agency's participation goals. Such amendments shall be submitted to the commissioner, the city chief procurement officer and the speaker of the council at least thirty days prior to implementation.

(4) Prior to approving individual agency utilization plans, the commissioner, in consultation with the city chief procurement officer, shall consider whether such plans viewed in the aggregate establish any goals exceeding the corresponding citywide goals set forth in subdivision d of this section. If any aggregated goals are found to exceed the corresponding citywide goal, the commissioner shall require agencies to adjust their goals so that plans, viewed in the aggregate, do not establish goals exceeding the citywide goals. Nothing in this paragraph shall be construed to limit the awards of contracts and subcontracts that may be made to MBEs, WBEs and EBEs without using goals.

(5) The commissioner, in consultation with the city chief procurement officer, shall, no later than July 31 of each year, publish on the division's website a plan and schedule for each agency detailing the anticipated contracting actions for the upcoming fiscal year that form the basis for the agency utilization plan of each such agency. The plan and schedule shall include information specific to each

prospective invitation for bids, request for proposal, or other solicitation, including, but not limited to, the specific type and scale of the services and/or goods to be procured, the term of the proposed contract, the method of solicitation the agency intends to utilize, and the anticipated fiscal year quarter of the planned solicitation.

h. Achieving agency participation goals.

(1) Each agency head shall be directly accountable for the goals set forth in his or her agency's utilization plan.

(2) Each agency shall make all reasonable efforts to meet the participation goals established in its agency utilization plan. Agencies shall, at a minimum, use the following methods to achieve participation goals:

[(i)](a) Agencies shall engage in outreach activities to encourage MBEs, WBEs and EBEs to compete for all facets of their procurement activities, including contracts awarded by negotiated acquisition, emergency and sole source contracts, and each agency shall seek to utilize MBEs, WBEs and/or EBEs for all types of goods, services and construction they procure.

[(ii)](b) Agencies shall encourage eligible businesses to apply for certification as MBEs, WBEs and EBEs and inclusion in the directories of MBEs, WBEs and EBEs. Agencies shall also encourage MBEs, WBEs and EBEs to have their names included on their bidders lists, seek pre-qualification where applicable, and compete for city business as contractors and subcontractors. Agencies are encouraged to advertise procurement opportunities in general circulation media, trade and professional association publications and small business media, and publications of minority and women's business organizations, and send written notice of specific procurement opportunities to minority and women's business organizations.

[(iii)](c) All agency solicitations for bids or proposals shall include information referring potential bidders or proposers to the directories of MBEs, WBEs and EBEs prepared by the division.

[(iv)](d) In planning procurements, agencies shall consider the effect of the scope, specifications and size of a contract on opportunities for participation by MBEs, WBEs and EBEs.

[(v)] For construction contracts, agencies shall consider whether to enter into separate prime contracts for construction support services including, but not limited to, trucking, landscaping, demolition, site clearing, surveying and site security.]

[(vi)](e) Prior to soliciting bids or proposals for contracts valued at over ten million dollars, other than contracts for capital projects valued at over twenty-five million dollars and contracts that are exempt pursuant to paragraph two of subdivision q of this section, an agency shall submit the bid or proposal to the city chief procurement officer for a determination whether it is practicable to divide the proposed contract into smaller contracts and whether doing so will enhance competition for such contracts among MBEs, WBEs and EBEs and other potential bidders or proposers. If the city chief procurement officer determines that it is both practicable and advantageous in light of cost and other relevant factors to divide such contracts into smaller contracts, then he or she shall direct the agency to do so.

[(vii)](f) Agencies shall examine their internal procurement policies, procedures and practices and, where practicable, address those elements, if any, that may negatively affect participation of MBEs, WBEs and EBEs in city procurement.

[(viii)] Agency M/WBE officers shall, in accordance with guidelines established by the city chief procurement officer, establish a process for quarterly meetings with MBEs, WBEs and EBEs to discuss what the agency looks for in evaluating bids and proposals.

(ix) Agencies shall encourage prime contractors to enter joint venture agreements with MBEs,

WBEs and EBEs.]

i. Participation goals for [construction and professional services] contracts for construction and professional and standard services.

(1) Prior to issuing the solicitation of bids or proposals for individual [construction and professional services] contracts, agencies shall establish [a target subcontracting percentage for the contract and] participation goals for MBEs, WBEs and/or EBEs. [The "target subcontracting percentage" for the contract shall represent the percentage of the total contract which the agency anticipates a typical prime contractor in the relevant industry would in the normal course of business award to one or more subcontractors for amounts under one million dollars. The participation goals established for a contract shall represent a percentage of the total dollar value of all subcontracts for amounts under one million dollars pursuant to the award]. Such goals may be greater than, less than or the same as the relevant citywide goal or goals established pursuant to subdivision d of this section. Taking into account the factors listed in this subdivision, an agency may establish a goal for a procurement that may be achieved by a combination of prime contract and subcontract dollars, a combination of construction and services performed pursuant to the contract, and/or a combination of MBEs, WBEs and/or EBEs. Alternatively, an agency may establish specific goals for particular types of services, and/or goals for particular types of certified firms. In determining the participation goals for a particular contract, an agency shall consider the following factors:

[(i)](a) the scope of work;

[(ii)](b) the availability of MBEs, WBEs and EBEs able to perform the particular tasks required in the contract;

[(iii)](c) the extent to which the type and scale of work involved in the contract [presents] present prime contracting and subcontracting opportunities for amounts [under one million dollars] within the



capacity of MBEs, WBEs and EBEs;

[(iv)](d) the agency's progress to date toward meeting its annual participation goals through race-neutral, gender-neutral and other means, and the agency's expectations as to the effect such methods will have on participation of MBEs, WBEs and EBEs in the agency's future contracts; and

[(v)](e) any other factors the contracting agency deems relevant.

(2) A contracting agency shall not be required to establish participation goals for

(i) procurements described in subdivision q of this section; or

(ii) when the agency has already attained the relevant goal in its annual utilization plan, or expects that it will attain such goal without the use of such participation goals.

(3) For each contract in which a contracting agency has established participation goals, such agency shall state in the solicitation for such contract that bidders and/or proposers shall be required to agree as a material term of the contract that[, with respect to the total amount of the contract to be awarded to one or more subcontractors pursuant to subcontracts for amounts under one million dollars,] the contractor shall [be subject to] meet the participation goals unless such goals are waived or modified by the agency in accordance with this section. A contractor that is an MBE, WBE or EBE shall be permitted to count its own participation toward fulfillment of the relevant participation goal, provided that the value of such a contractor's participation shall be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors. A contractor that is a qualified joint venture shall be permitted to count a percentage of its own participation toward fulfillment of the relevant participation goal. The value of such a contractor's participation shall be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to

determine the amount to which an MBE, WBE or EBE is entitled pursuant to the joint venture agreement;

(4) For each contract in which participation goals are established, the agency shall include in its solicitation and/or bidding materials a referral to the directories prepared by the division pursuant to this section.

(5) For each contract for which participation goals are established, the contractor shall be required to submit with its bid or proposal[,] a contractor utilization plan indicating:

(a) whether the contractor is an MBE, WBE, EBE, or a qualified joint venture; [the percentage of the work it intends to subcontract, and]

(b) the percentage of work it intends to award to direct subcontractors; [for amounts under one million dollars, and,] and

(c) in cases where the contractor intends to award direct subcontracts, [for amounts under one million dollars,] a description of the type and dollar value of work designated for participation by MBEs, WBEs and/or EBEs, and the time frames in which such work is scheduled to begin and end.

When the contractor utilization plan indicates that the bidder or proposer does not intend to [award the target subcontracting percentage] meet the participation goals, the bid or proposal shall not be deemed responsive unless the agency has granted a pre-award [waiver] request for change pursuant to paragraph 11 of this subdivision.

(6) (a) For each contract for which a contractor utilization plan has been submitted, the contracting agency shall require that within thirty days of the issuance of notice to proceed, and at least once per year thereafter, the contractor submit a list of persons to which it intends to award subcontracts within the next twelve months. In the event that a contracting agency disapproves a contractor's selection of a subcontractor or subcontractors, the contracting agency shall allow such contractor a reasonable time

to propose alternate subcontractors.

(b) The contracting agency may also require the contractor to report periodically about the contracts awarded by its direct subcontractors to indirect subcontractors.

(7) For each contract for which a contractor utilization plan has been submitted, the contractor shall, with each voucher for payment, and/or periodically as the agency may require, submit statements, certified under penalty of perjury, which shall include, but not be limited to, the total amount the contractor paid to its direct subcontractors, and the total amount direct subcontractors paid to indirect subcontractors, [(including subcontractors that are not MBEs, WBEs or EBEs)]; the names, addresses and contact numbers of each MBE, WBE or EBE hired as a subcontractor [pursuant to such plan] by the contractor or any of the contractor's direct subcontractors, as well as the dates and amounts paid to each MBE, WBE or EBE. The contractor shall also submit, along with its voucher for final payment, the total amount it paid to subcontractors, and the total amount its direct subcontractors paid directly to their indirect subcontractors [(including subcontractors that are not MBEs, WBEs or EBEs)]; and a final list, certified under penalty of perjury, which shall include the name, address and contact information of each subcontractor that is an MBE, WBE or EBE [hired pursuant to such plan], the work performed by, and the dates and amounts paid to each.

(8) If payments made to, or work performed by, MBEs, WBEs or EBEs are less than the amount specified in the contractor's utilization plan, the agency shall take appropriate action in accordance with subdivision o of this section, unless the contractor has obtained a modification of its utilization plan pursuant to paragraph 12 of this subdivision.

(9) When advertising a solicitation for bids or proposals for a contract for which a participation goal has been established, agencies shall include in the advertisement a general statement that the contract will be subject to participation goals for MBEs, WBEs and/or EBEs.

(10) In the event that a contractor with a contract that includes a contractor utilization plan submits a request for a change order the value of which exceeds the greater of ten percent of such contract or \$500,000, the agency shall [establish participation goals as if for a new contract for the work to be performed pursuant to such change order] review the scope of work for the contract, and the scale and types of work involved in the change order, and determine whether the participation goals should be modified.

(11) [Pre-award waiver]Requests from bidders or proposers for changes in participation goals.

(a) A bidder or proposer may request that an agency change the participation goal or goals established for the procurement on the grounds that goals are unreasonable in light of the availability of certified firms to perform the services required, or by demonstrating that it has legitimate business reasons for proposing a lower level of subcontracting in its utilization plan.

(b) If the contracting agency determines that the participation goals established for the procurement are unreasonable in light of the availability of certified firms to perform the services required, it shall revise the solicitation and extend the deadline for bids and proposals.

[(i)](c) Subject to subparagraph [(ii)]d) of this paragraph, the contracting agency may grant a full or partial waiver of the [target subcontracting percentage] participation goals to a bidder or proposer who demonstrates that it has legitimate business reasons for proposing the level of subcontracting in its utilization plan. The contracting agency shall make its determination in light of factors [which] that shall include, but not be limited to, whether the bidder or proposer has the capacity and the bona fide intention to perform the contract without any subcontracting, or to perform the contract without awarding the amount of subcontracts [for under one million dollars] represented by the [target subcontracting percentage] participation goals. In making such determination, the agency may consider whether the utilization plan is consistent with past subcontracting practices of the bidder or proposer, whether the

bidder or proposer has made efforts to form a joint venture with a certified firm, and whether the bidder or proposer has made good faith efforts to identify portions of the contract that it intends to subcontract. Within thirty days of the registration of a contract, the city chief contracting officer shall notify the council of any such waiver granted with respect to the contract.

[(ii)](d) The agency M/WBE officer shall provide written notice of requests for a full or partial waiver of the [target subcontracting percentage] participation goals to the division and the city chief procurement officer and shall not approve any such request without the approval of the city chief procurement officer, provided that the city chief procurement officer, upon adequate assurances of an agency's ability to administer its utilization plan in accordance with the provisions of this section, may determine that further approval from the city chief procurement officer is not required with respect to such requests for an agency's contracts or particular categories of an agency's contracts. The city chief procurement officer shall notify the speaker of the council in writing within thirty days of the registration of a contract for which a request for a full or partial waiver of a [target subcontracting percentage] participation goal was granted, provided that where an agency has been authorized to grant waivers without approval of the chief procurement officer, such notice shall be provided to the speaker of the council by the agency. Such notification shall include, but not be limited to, the name of the contractor, the original [target subcontracting percentage] participation goal, the waiver request, including all documentation, and an explanation for the approval of such request.

(12) Modification of utilization plans at contractor's request or agency's initiative. [(i)](a) A contractor may request modification of its utilization plan after the award of a contract. Subject to subparagraph [(ii)](b) of this paragraph, an agency may grant such request if it determines that such contractor has established, with appropriate documentary and other evidence, that it made all reasonable, good faith efforts to meet the goals set by the agency for the contract. In making such determination, the agency shall consider evidence of the following efforts, as applicable, along with any other relevant

factors:

[(A)](i) The contractor advertised opportunities to participate in the contract, where appropriate, in general circulation media, trade and professional association publications and small business media, and publications of minority and women's business organizations;

[(B)](ii) The contractor provided notice of specific opportunities to participate in the contract, in a timely manner, to minority and women's business organizations;

[(C)](iii) The contractor sent written notices, by certified mail or facsimile, in a timely manner, to advise MBEs, WBEs or EBEs that their interest in the contract was solicited;

[(D)](iv) The contractor made efforts to identify portions of the work that could be substituted for portions originally designated for participation by MBEs, WBEs and/or EBEs in the contractor utilization plan, and for which the contractor claims an inability to retain MBEs, WBEs or EBEs;

[(E)](v) The contractor held meetings with MBEs, WBEs and/or EBEs prior to the date their bids or proposals were due, for the purpose of explaining in detail the scope and requirements of the work for which their bids or proposals were solicited;

[(F)](vi) The contractor made efforts to negotiate with MBEs, WBEs and/or EBEs as relevant to perform specific subcontracts, or act as suppliers or service providers;

[(G)](vii) Timely written requests for assistance made by the contractor to the agency M/WBE liaison officer and to the division; and

[(H)](viii) Description of how recommendations made by the division and the contracting agency were acted upon and an explanation of why action upon such recommendations did not lead to the desired level of participation of MBEs, WBEs and/or EBEs.

~~[(ii)](b)~~ The agency M/WBE officer shall provide written notice of requests for such modifications to the division and the city chief procurement officer and shall not approve any such request for modification without the approval of the city chief procurement officer, provided that the city chief procurement officer, upon adequate assurances of an agency's ability to administer its utilization plan in accordance with the provisions of this section, may determine that further approval from the city chief procurement officer is not required with respect to such requests for an agency's contracts or particular categories of an agency's contracts. The city chief procurement officer, shall notify the speaker of the council in writing within seven days of the approval of a request for modification of a utilization plan, provided that where an agency has been authorized to grant modifications without approval of the chief procurement officer, such notice shall be provided to the speaker of the council by the agency. Such notification shall include, but not be limited to, the name of the contractor, the original utilization plan, the modification request, including all documentation, and an explanation for the approval of such request.

~~[(iii)](c)~~ An agency may modify the participation goals established for a procurement when the scope of the work has been changed by the agency in a manner that affects the scale and types of work that the contractor indicated in its contractor utilization plan would be awarded to subcontractors.

~~[(iv)](d)~~ The agency M/WBE officer shall provide written notice to the contractor of its determination that shall include the reasons for such determination.

(13) For each contract in which a contracting agency has established participation goals, the agency shall evaluate and assess the contractor's performance in meeting each such goal. Such evaluation and assessment shall be a part of the contractor's overall contract performance evaluation required pursuant to section 333 of the charter.

j. Determining credit for MBE, WBE and EBE participation.

(1) An agency's achievement of its annual goals shall be calculated as follows:

[(i)](a) The [total] dollar amount that an agency has paid or is obligated to pay to a prime contractor that is an MBE, WBE or EBE, reduced by the dollar amount the contractor has paid or is obligated to pay its direct subcontractors upon their completion of work, [may] shall be credited toward the relevant goal.

[(ii)](b) The total dollar amount that a prime contractor of an agency has paid or is obligated to pay to a direct subcontractor that is an MBE, WBE or EBE [may], reduced by the dollar amount the direct subcontractor has paid or is obligated to pay its indirect subcontractors upon their completion of work, shall be credited toward the relevant goal.

(c) The total dollar amount that a direct subcontractor of the prime contractor has paid or is obligated to pay to an indirect subcontractor that is an MBE, WBE or EBE shall be credited toward the relevant goal.

[(iii)](d) For requirements contracts, credit [may] shall be given for the actual dollar amount paid under the contract.

[(iv)](e) Where one or more MBEs, WBEs or EBEs is participating in a qualified joint venture, the amounts that the joint venture is required to pay its direct subcontractors shall be subtracted as provided in subparagraph a, and then a percentage of the remaining dollar amount of the contract equal to the percentage of total profit to which MBEs, WBEs or EBEs are entitled pursuant to the joint venture agreement shall be credited toward the relevant goal.

[(v)](f) No credit shall be given for participation in a contract by an MBE, WBE or EBE that does not perform a commercially useful function.

[(vi)](g) No credit shall be given for the participation in a contract by any company that has not



been certified as an MBE, WBE or EBE in accordance with section 1304 of the charter.

[(vii)](h) In the case of a contract for which the contractor is paid on a commission basis, the dollar amount of the contract may be determined on the basis of the commission earned or reasonably anticipated to be earned under the contract.

[(viii)](i) No credit shall be given to a contractor for participation in a contract by a graduate MBE, WBE or EBE.

[(ix)](i) The participation of a certified company shall not be credited toward more than one participation goal.

(2) A contractor's achievement of [each goal] its participation goals established in its utilization plan shall be calculated [in the same manner as described for calculating the achievement of agency utilization goals as described in paragraph (1) of this subdivision; provided that no] as follows:

[(i)](a) A contractor's use of direct subcontractors and their indirect subcontractors toward achievement of each goal established in its utilization plan shall be calculated in the same manner as described for calculating the achievement of agency utilization goals as described in paragraph (1) of this subdivision;

[(ii)](b) A contractor that is an MBE, WBE or EBE shall be permitted to count its own participation toward fulfillment of the relevant participation goal, provided that the value of such a contractor's participation shall be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors;

[(iii)](c) No credit shall be given to the contractor for the participation of a company that is not certified in accordance with section 1304 of the charter before the date that [the agency approves] the subcontractor completes the work under the subcontract.

[(iv)](d) A contractor that is a qualified joint venture shall be permitted to count a percentage of its own participation toward fulfillment of the relevant participation goal. The value of such a contractor's participation shall be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to determine the amount to which an MBE, WBE or EBE is entitled pursuant to the joint venture agreement:

k. Small purchases.

[(1) Each agency shall, consistent with the participation goals established in subdivision d of this section and such agency's utilization plan, establish goals for purchases valued at or below five thousand dollars which shall be made from MBEs, WBEs and/or EBEs.

(2)] Whenever an agency solicits bids or proposals for small purchases pursuant to section three hundred fourteen of the charter, the agency shall maintain records identifying the MBEs, WBEs and EBEs it solicited, which shall become part of the contract file.

l. Compliance reporting.

(1) The city chief procurement officer, in consultation with the division, shall prepare and submit [semiannual]quarterly reports to the speaker of the council as described in this section. [A p]Preliminary reports containing information for the fiscal year in progress shall be submitted to the speaker of the council by January first, April first, and July first of each year[April 1, 2007, and annually thereafter], and a final report containing information for the preceding fiscal year shall be submitted to the speaker of the council by October first of each year[October 1, 2007 and annually thereafter]. The reports, which shall also be posted on the division's website, shall contain the following information, disaggregated by agency:

[(i)](a) the number and total dollar value of contracts awarded, disaggregated by industry

classification and size of contract, including but not limited to, contracts valued at or below twenty thousand dollars, contracts valued above twenty thousand dollars and at or below one hundred thousand dollars, contracts valued above one hundred thousand dollars and at or below one million dollars, contracts valued above one million dollars and at or below five million dollars, contracts valued above five million dollars and at or below twenty five million dollars, and contracts valued above twenty five million dollars; [, provided that contracts for amounts under five thousand dollars need not be disaggregated by industry;

(ii) The number and total dollar value of contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification, provided that contracts for amounts under five thousand dollars need not be disaggregated by industry;

(iii) the total number and total dollar value of contracts awarded valued at less than five thousand dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group;

(iv) the total number and total dollar value of contracts awarded valued at between five thousand and one hundred thousand dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification;

(v) the total number and total dollar value of contracts awarded valued at between one hundred thousand dollars and one million dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification;

(vi) the total number and total dollar value of contracts awarded valued at over one million dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification;

(vii)](b) for those contracts for which an agency set participation goals in accordance with subdivision i of this section:

[(A)](i) The number and total dollar amount of such contracts disaggregated by industry classification, size of contract and status as MBE, WBE, EBE, or non-certified firm, and further disaggregated by minority and gender group;

[(B)](ii) the number and total dollar value of such contracts that were awarded to qualified joint ventures and the total dollar amount attributed to the MBE, WBE or EBE joint venture partners, disaggregated by minority and gender group, size of contract and industry classification;

[(C)](iii) The number and total dollar value of subcontracts approved during the reporting period that were entered into pursuant to [such] contracts for which participation requirements under this section have been established (including both contracts awarded during the current reporting period and those awarded in earlier reporting periods that remain open during the current reporting period), and the number and total dollar amount of such subcontracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group, size of subcontract and industry classification; [and]

[(D)](iv) a list of the requests for full or partial waivers of [target subcontracting percentages granted] participation requirements for such contracts made pursuant to paragraph 11 [12] of subdivision i of this section and the determinations made with respect to such requests, and the number and dollar amount of those contracts for which such waivers were granted, disaggregated by industry classification; and

[(E)](v) a list of the requests for modification of participation requirements for such contracts made pursuant to paragraph 12 of subdivision i of this section and the determinations made with respect to such requests, and the number and dollar amount of those contracts for which such modifications were granted, disaggregated by industry classification;

[(viii)](c) a detailed list of each complaint received pursuant to paragraph 1 of subdivision o of this section which shall, at a minimum, include the nature of each complaint and the action taken in investigating and addressing such complaint including whether and in what manner the enforcement provisions of subdivision o of this section were invoked and the remedies applied;

[(ix)](d) a detailed list of all non-compliance findings made pursuant to paragraph 4 of subdivision o of this section and actions taken in response to such findings;

[(x)](e) the number of firms certified or recertified in accordance with section 1304 of the charter during the six months immediately preceding such report;

[(xi)](f) the number and percentage of contracts audited pursuant to section paragraph 10 of subdivision e of this section and a summary of the results of each audit.

[(xii)](g) a summary of efforts to reduce or eliminate barriers to competition as required pursuant to paragraph 11 of subdivision e of this section;

[(xiii)](h) a list of all solicitations submitted to the city chief procurement officer pursuant to subparagraph [vi]e of paragraph 2 of subdivision h of this section and a summary of the determination made regarding each such submission; and

[(xiv)](i) any other information as may be required by the commissioner and/or the director.

(2) The annual reports submitted in October shall, in addition, contain a determination made by the commissioner and the director, as to whether each agency has made substantial progress toward achieving its utilization goals and whether the city has made substantial progress toward achieving the citywide goals established pursuant to subdivision d of this section. [The first three annual reports shall also include detailed information about steps that agencies have taken to initiate and ramp up their efforts to comply with the requirements of this section.]

(3) If an agency fails to achieve its utilization goal, such agency shall prepare and submit to the commissioner, the city chief procurement officer, the director, and the speaker of the council by October first a performance improvement plan which shall describe in detail the efforts such agency intends to undertake to increase M/WBE participation.

~~[(3)](4)~~ The data that provide the basis for the reports required by this subdivision shall be made available electronically to the council at the time the reports are submitted.

m. Agency compliance.

(1) ~~[The]~~Each agency shall submit to the commissioner and the city chief procurement officer such information as is necessary for the city chief procurement officer to complete his or her reports as required in subdivision l of this section. The commissioner, ~~[and]~~ the city chief procurement officer, ~~and the director~~ shall review each agency's submissions. The director shall convene the agency M/WBE officers for those agencies that have established participation goals of greater than one million dollars for construction services, professional services, or standard services as often as the director deems necessary, but no less frequently than once per quarter, in order to have agency M/WBE officers (i) discuss the results of the reports required in subdivision l of this section; (ii) offer detailed information concerning their effectuation of their performance improvement plans and any additional efforts undertaken to meet goals established in agency utilization plans; (iii) share the practices that have yielded successes in increasing M/WBE participation; and (iv) devise strategic plans to improve the performance of those failing to meet goals established in agency utilization plans. ~~[and w]~~Whenever it has been determined that an agency is not making adequate progress toward the goals established in its agency utilization plan, the commissioner, [and] the city chief procurement officer, and the director shall act to improve such agency's performance, and may take any of the following actions:

~~[(i)](a)~~ require the agency to submit more frequent reports about its procurement activity;

[(ii)](b) require the agency to notify the commissioner, [and] the city chief procurement officer, and the director, prior to solicitation of bids or proposals for, and/or prior to award of, contracts in any category where the agency has not made adequate progress toward achieving its utilization goals;

[(iii)](c) reduce or rescind contract processing authority delegated by the mayor pursuant to sections 317 and 318 of the charter; and

[(iv)](d) any other action the commissioner, [and] the city chief procurement officer, or the director deem appropriate.

(2) Noncompliance. Whenever the city chief procurement officer, [or] the commissioner, or the director finds that an agency has failed to comply with its duties under this section, he or she shall attempt to resolve such noncompliance informally with the agency head. In the event that the agency fails to remedy its noncompliance after such informal efforts, the director and the city chief procurement officer shall submit such findings in writing to the mayor and the speaker of the council, and the mayor shall take appropriate measures to ensure compliance.

(3) Failure by an agency to submit information required by the division, [or] the city chief procurement officer, or the director, in accordance with this section, including but not limited to the utilization plan required pursuant to subdivision g of this section, shall be deemed noncompliance.

n. Pre-qualification. An agency establishing a list of pre-qualified bidders or proposers may deny pre-qualification to prospective contractors who fail to demonstrate in their application for pre-qualification that they have complied with applicable federal, state and local requirements for participation of MBEs, WBEs and EBEs in procurements. A denial of pre-qualification may be appealed pursuant to applicable procurement policy board rules.

o. Enforcement.

(1) Any person who believes that a violation of the requirements of this section, rules promulgated pursuant to its provisions, or any provision of a contract that implements this section or such rules, including, but not limited to, any contractor utilization plan, has occurred may submit a complaint in writing to the division, the city chief procurement officer and the comptroller. [Such complaint shall be signed and dated.] The division shall promptly investigate such complaint and determine whether there has been a violation.

(2) Any complaint alleging fraud, corruption or other criminal behavior on, the part of a bidder, proposer, contractor, subcontractor or supplier shall be referred to the commissioner of the department of investigation.

(3) Contract award.

[(i)](a) When an agency receives a protest from a bidder or proposer regarding a contracting action that is related to this section, the agency shall send copies of the protest and any appeal thereof, and any decisions made on the protest or such appeal, to the division and the comptroller.

[(ii)](b) Whenever a contracting agency has determined that a bidder or proposer has violated this section, or rules promulgated pursuant to its provisions, the agency may disqualify such bidder or proposer from competing for such contract and the agency may revoke such bidder's or proposer's prequalification status.

(4) Contract administration.

(a) For each contract for which participation requirements have been established under this section, at least once annually during the term of such contract, the contracting agency shall review the contractor's progress toward attainment of its utilization plan, including but not limited to, by reviewing the percentage of work the contractor has actually awarded to MBE, WBE and/or EBE subcontractors and



the payments the contractor has made to such subcontractors.

[(i)](b) Whenever an agency believes that a contractor or a subcontractor is not in compliance with this section, rules promulgated pursuant to its provisions or any provision of a contract that implements this section, including, but not limited to any contractor utilization plan, the agency shall send a written notice to the city chief procurement officer, the division and the contractor describing the alleged noncompliance and offering the contractor an opportunity to be heard. The agency shall then conduct an investigation to determine whether such contractor or subcontractor is in compliance.

[(ii)](c) In the event that a contractor has been found to have violated this section, rules promulgated pursuant to its provisions, or any provision of a contract that implements this section, including, but not limited to any contractor utilization plan, the contracting agency shall, after consulting with the city chief procurement officer and the division, determine whether any of the following actions should be taken:

[(A)](i) enter an agreement with the contractor allowing the contractor to cure the violation;

[(B)](ii) revoke the contractor's pre-qualification to bid or make proposals for future contracts;

[(C)](iii) make a finding that the contractor is in default of the contract;

[(D)](iv) terminate the contract;

[(E)](v) declare the contractor to be in breach of contract;

[(F)](vi) withhold payment or reimbursement;

[(G)](vii) determine not to renew the contract;

[(H)](viii) assess actual and consequential damages;

[(I)](ix) assess liquidated damages or reduction of fees, provided that liquidated damages may be based on amounts representing costs of delays in carrying out the purposes of the program established by this section, or in meeting the purposes of the contract, the costs of meeting utilization goals through additional procurements, the administrative costs of investigation and enforcement, or other factors set forth in the contract;

[(J)](x) exercise rights under the contract to procure goods, services or construction from another contractor and charge the cost of such contract to the contractor that has been found to be in noncompliance; or

[(K)](xi) take any other appropriate remedy.

(5) To the extent available pursuant to rules of the procurement policy board, a contractor may seek resolution of a dispute regarding a contract related to this section. The contracting agency shall submit a copy of such submission to the division.

(6) Whenever an agency has reason to believe that an MBE, WBE or EBE is not qualified for certification, or is participating in a contract in a manner that does not serve a commercially useful function, or has violated any provision of this section, the agency shall notify the commissioner who shall determine whether the certification of such business enterprise should be revoked.

(7) Statements made in any instrument submitted to a contracting agency pursuant to these rules shall be submitted under penalty of perjury and any false or misleading statement or omission shall be grounds for the application of any applicable criminal and/or civil penalties for perjury. The making of a false or fraudulent statement by an MBE, WBE or EBE in any instrument submitted pursuant to these rules shall, in addition, be grounds for revocation of its certification.

(8) A contractor's record in implementing its contractor utilization plan shall be a factor in the evaluation of its performance. Whenever a contracting agency determines that a contractor's compliance with a contractor utilization plan has been unsatisfactory, the agency shall, after consultation with the city chief procurement officer, file an advice of caution form for inclusion in VENDEX as caution data.

p. Procurements by elected officials and the council.

(1) In the case of procurements by independently elected city officials other than the mayor, where these rules provide for any action to be taken by the director or the city chief procurement officer, such action shall instead be taken by such elected officials.

(2) In the case of procurements by the council, where these rules provide for any action to be taken by the director or the city chief procurement officer, such action shall instead be taken by the speaker of the council.

q. Applicability. Agencies shall not be required to apply participation requirements to the following types of contracts:

[(i)](1) those subject to federal or state funding requirements which preclude the city from imposing the requirements of this subdivision;

[(ii)](2) those subject to federal or state law participation requirements for MBEs, WBEs, disadvantaged business enterprises, and/or EBEs;

[(iii)](3) contracts between agencies;

[(iv)](4) procurements made through the [united states] United States general services administration or another federal agency, or through the New York state office of general services or another state agency, or any other governmental agency.

[(v)](5) emergency procurements pursuant to section three hundred fifteen of the charter;

[(vi)](6) sole source procurements pursuant to section three hundred twenty-one of the charter;

[(vii)](7) [small purchases as defined pursuant to section three hundred fourteen of the charter;]

contracts for human services; and

[(viii)](8) contracts awarded to not-for-profit organizations.

r. Comptroller. The comptroller shall randomly examine contracts for which contractor utilization plans are established to assess compliance with such plans. All solicitations for contracts for which contractor utilization plans are to be established shall include notice of potential comptroller examinations.

§3. Severability. If any section, subsection, paragraph, sentence, clause, phrase or

other portion of this local law is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this law, which remaining portions shall continue in full force and effect.

§4. Effective date. This local law shall take effect 120 days after it shall have become law, provided that the department of small business services may take actions necessary, including rulemaking, to implement the requirements of this local law prior to its effective date.

8/16/12

## APPENDIX B: OWNERSHIP SURVEY

Trained MOCS staff conducted calls from January 26-February 9, 2011, using phone numbers obtained from City databases. All firms were attempted at least once. If phone numbers provided were not in service, new numbers were obtained if available. Callers were not made aware of the survey's purpose.

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Hello, this is {full name} calling from the City of NY. We're doing a brief survey to find out more information about companies that might be available to do business with the City. Would you mind answering a few questions? It will only take a few minutes.

IF NO: When would be a better time? (Record in notes)

IF YES: Thank you. Some of these questions will relate to the ownership of your company. Can I confirm that I am speaking with someone who will be able to address this?

IF NO: Can you connect me with someone who can, such as a principal owner or senior manager?

IF NO: When would be a better time? (Record in notes)

1. Is your company actively seeking business opportunities, including possible contracts with the City of NY?  
(Record Yes/No)

2. Have you ever done business with the City? (Record Yes/No)

3. Is your company a publicly traded corporation? (Record Yes/No) IF YES: Go to EXIT

4. Is your company a non-profit organization? (Record Yes/No) IF YES: Go to EXIT

5. Is your company minority or women-owned?

IF YES: What is the best description of that ownership: African American, Hispanic American, Asian American, Caucasian Woman? (Record answer in Q5)

6a. Are you interested in certifying as a [Minority / Women] Owned Business with the City?

IF YES: (Record contact info in Q6a)

6b. Are you interested in learning more about procurement opportunities with the City of NY?

(Record contact info in Q6b)

Go To EXIT

IF NO: (Record Non-Minority for Q5) Go to EXIT

EXIT: Thank you for taking the time to speak with me today. Your answers will be used only for research purposes and will not affect your ability to do business with the City. (Record Made Contact Date).

### Ownership Survey Call Completion

| Industry              | Firms Responding | Refused to Answer | No Contact, Left Message, etc. | Total        |
|-----------------------|------------------|-------------------|--------------------------------|--------------|
| Construction          | 86               | 24                | 140                            | 250          |
| Goods                 | 73               | 30                | 147                            | 250          |
| Professional Services | 62               | 29                | 159                            | 250          |
| Standardized Services | 77               | 14                | 159                            | 250          |
| <b>Total</b>          | <b>298</b>       | <b>97</b>         | <b>605</b>                     | <b>1,000</b> |

## APPENDIX C: PURE PRIME CALCULATION

To illustrate the concept of “pure prime” value, take the example of a \$5.5 million contract for the construction of traffic calming features in downtown Brooklyn awarded by the Department of Design and Construction (DDC) in September 2008. The prime contractor subsequently entered into 19 subcontracts for various tasks on the project, with a total value of \$2.4 million, leaving a pure prime value of \$3.1 million retained by the prime contractor. Most of the subcontracts were for construction work like paving and excavation, four subcontracts were for standardized services like soil sampling and pest control and one subcontract was for an arborist consultant, considered a professional service. The calculation of pure prime and final distribution of dollars is shown below.

|                  | Construction |    | Professional Services |     | Standardized Services |     | Total       |
|------------------|--------------|----|-----------------------|-----|-----------------------|-----|-------------|
|                  | \$           | #  | \$                    | #   | \$                    | #   |             |
| Prime            | \$5,485,339  | 1  | \$0                   | n/a | \$0                   | n/a | \$5,485,339 |
| Subcontracts     | \$2,235,700  | 14 | \$30,000              | 1   | \$102,600             | 4   | \$2,368,300 |
| Pure Prime       | \$3,117,039  | 1  | \$0                   | n/a | \$0                   | n/a | \$3,117,039 |
| Pure Prime + Sub | \$5,352,739  | 15 | \$30,000              | 1   | \$102,600             | 4   | \$5,485,339 |

To further illustrate how the pure prime concept relates to M/WBE utilization, take the example of a \$4.6 million contract for the reconstruction of the bathrooms and playground at Sara D. Roosevelt Park awarded by the Department of Parks and Recreation (DPR) in April 2009. In this case, the prime contractor was a certified Hispanic-owned firm. The prime contractor subsequently entered into 14 subcontracts for various tasks on the project, such as plumbing, electrical work and tree planting, all of which are considered to be construction. The total value of all subcontract work was \$600,000, leaving a pure prime value of \$4 million retained by the prime contractor. Several of the subcontractors were themselves M/WBE firms and the calculation of pure prime and final distribution of dollars among the ethnicity and gender categories is shown below.

|                  | Asian     |     | Black     |     | Hispanic    |      | All M/WBE   |      | Non-M/WBE |    | Total       |
|------------------|-----------|-----|-----------|-----|-------------|------|-------------|------|-----------|----|-------------|
|                  | \$        | %   | \$        | %   | \$          | %    | \$          | %    | \$        | %  |             |
| Prime            | \$0       | 0%  | \$0       | 0%  | \$4,581,997 | 100% | \$4,581,997 | 100% | \$0       | 0% | \$4,581,997 |
| Subcontracts     | \$203,908 | 33% | \$368,563 | 60% | \$0         | 0%   | \$572,471   | 94%  | \$37,500  | 6% | \$609,971   |
| Pure Prime       | \$0       | 0%  | \$0       | 0%  | \$3,972,026 | 100% | \$3,972,026 | 100% | \$0       | 0% | \$3,972,026 |
| Pure Prime + Sub | \$203,908 | 4%  | \$368,563 | 8%  | \$3,972,026 | 87%  | \$4,544,497 | 99%  | \$37,500  | 1% | \$4,581,997 |